

GEORGE R. HARRIS
v.
DEPARTMENT OF THE NAVY

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This case comes before the Board on the agency's petition for review of an initial decision of the Board's Philadelphia Regional Office sustaining the charges against the appellant but mitigating the penalty of removal to a two-day suspension. At the time of the effective date of his removal, October 9, 1981, appellant was a Woodworker, WG-8, with the Naval Supply Center, Norfolk, Virginia.

In the Board's initial decision of February 16, 1982, the presiding official sustained the charge of unauthorized possession of government property but only with reference to the two sanders. He found that the agency did not prove by a preponderance of the evidence that the two wrenches were government property. I.D. at 2-3, and 5. In addition, the presiding official considered at length the

question of the penalty and found that the penalty of removal was inappropriate. Such finding was based on his consideration of numerous mitigating factors as well as the fact that the agency had deviated from the guidance in its table of penalties in removing appellant for the first offense of unauthorized possession of government property. The table of penalties provided only for a range of penalties from reprimand to a two-day suspension. CMMI 751.1 at 6.

The only matter raised by the agency in its petition for review is the question of the penalty.^{1/} The agency petition contends, inter alia, that the presiding official erred in reducing the removal to a two-day suspension because the table of penalties only represents guidance and need not be strictly followed. The petition further contends that the penalty should not have been mitigated pursuant to Douglas v. Veterans Administration, 5 MSPB 313 (1981) because of the seriousness of the offense.

With respect to the question of the table of penalties, we note that only in the case of a first offense of actual or attempted theft, does the table of penalties provide for a range of penalties from reprimand to removal. CMMI 751.1 at 2.^{2/} For the first commission of the less serious offense of unauthorized possession, the maximum penalty provided for is a two-day suspension. The presiding official, citing

^{1/} The appellant did not respond to the petition for review.

^{2/} CMMI 751.1, "Appendix A. Guideline Schedule of Disciplinary Offenses and Penalties for Civilian Employees in the Naval Establishment" (Joint Hearing Exhibit #1).

Daub v. United States, 292 F.2d 895, 897 (Ct. Cl. 1961),^{3/} found that a deviation from the table of penalties as large as that in the instant case required a showing of unusual circumstances and that the agency had failed to show why the case at hand represented a unique case of unauthorized possession warranting such a large increase in penalty. I.D. at 7.

^{3/} Daub at 897:

The Government argues, correctly, that the table of penalties was intended to be a guide to administrative officers, and not an immutable schedule. But the regulation containing the table had a spirit, as well as a body, and the spirit of fair treatment would hardly have authorized the officer who was applying the regulation to substitute the extreme penalty, discharge, for the lightest penalty, reprimand, unless the case at hand was a most extraordinary one.

See also Power v. United States, 531 F.2d 505, 507 (Ct. Cl. 1976):

As a general rule, a penalty for employee misconduct is a matter left to the discretion of the executive agency ... [citations omitted]. However, in two situations courts will not uphold the punishment imposed by the agency. The first test for an invalid penalty is whether or not the sanction exceeds the range of permissible punishments specified by statute or regulation. [citations omitted].

Both the Daub Court and the Power Court presumed the internally promulgated table of penalties to be a "regulation", and not mere guidance.

While it is clear that the table of penalties is not a totally rigid document, the document itself provides as follows:

Penalties for disciplinary offenses will, in general, range from the minimum penalty to the maximum indicated. In unusual circumstances, depending on the gravity of the offense, the past record, and the position of the employee, a penalty outside the general range may be imposed. (CMMI-751.1 at 1)

No argument or evidence presented in the petition for review controverts the conclusions of the presiding official. To the contrary, the guidance in the table of penalties itself requires a showing of unusual circumstances. We must concur with the presiding official that such unusual circumstances have not been shown to be present in the instant case. Appellant had no past disciplinary record in his career of over 30 years with the Naval Supply Center. Moreover, there is no evidence in the record that, as a woodworker, he occupied a position of special trust. While it is true, as the agency asserts in its petition, that theft is serious and compromises the mission of the agency as a Supply Center, appellant was not charged with theft or attempted theft, but with unauthorized possession. While the record is unclear as to what the agency intends unauthorized possession to mean, it appears to lack the element of intent to steal, and therefore must be regarded as less serious than theft or attempted theft. Thus, we find that the agency did not show that the offense was so grave as to warrant unusual treatment, and the agency is therefore obliged to follow its table of penalties.

Although the agency contends that the presiding official misapplied Douglas, supra, we find nothing in the petition which warrants our review of the presiding official's exhaustive analysis of this matter. The agency reiterates its concern for theft and theft related offenses and invites our attention to numerous instances of removal for these offenses. (ag. hearing ex. #9) Only one of these

instances appears to involve unauthorized possession of government property and there is no showing that there were numerous mitigating circumstances such as are present in the instant case.^{4/} In the case at hand, the presiding official found numerous mitigating factors present including appellant's outstanding performance rating of 1977, his 36 years of good service, two letters of recommendation from two of his former supervisors, and the testimony of numerous character witnesses at the hearing, most of whom were co-workers. These persons testified concerning appellant's service to his church and his community, and his potential for rehabilitation.

In light of the above we hereby DENY the petition for review. This is the final order of the Merit Systems Protection Board. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(c).

The agency is hereby ORDERED to cancel the removal and substitute in lieu thereof a two day suspension. Proof of compliance with this order shall be submitted by the agency to the Office of the Secretary of the Board within twenty days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the Philadelphia Regional Office in accordance with 5 C.F.R. § 1201.181(a).

^{4/} The agency decision to remove the forklift operator in the case involving unauthorized possession of government property was upheld by the Board's Philadelphia Regional Office in Glasper v. Department of the Navy, PH07528010380 (December 17, 1980). No petition for review was filed with the Board. Initial decisions are of no precedential value and therefore are not binding on the Board. Clark v. Department of the Navy, SE075209073ADD at 2 (July 16, 1982).

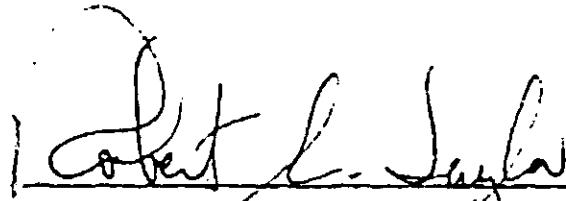
Appellant is hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

JUN 14 1955

(Date)

Washington, D.C.


Robert E. Taylor
Secretary